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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE

Federal Communications Commission

WASHINGTON, D. C. 20554

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In re	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM DOCKET NO. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM DOCKET NO. 87-8

To: The Commission

COMMENTS OF BROOKS BROADCASTING, LLC

Brooks Broadcasting, LLC ("Brooks"), by its attorneys, hereby submits the following comments in response to the Further Notice of Proposed Rule Making, 60 Fed. Reg. 6490, released January 17, 1995, in the above-captioned proceeding (the "Notice").

I. Introduction.

Brooks is the permittee of KASW, a new television station on Channel 61 in Phoenix, Arizona. Brooks anticipates that KASW will go on the air this summer.[1] Brooks has entered into a Local Marketing Agreement with Media America Corporation, licensee of independent television station KTVK, Channel 3, in Phoenix.

Under the LMA with Media America Corporation, Brooks has worked closely with the broker's programming employees to develop

1 This estimate assumes prompt FCC action on a pending application to modify the construction permit to specify a slightly different transmitter site.

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an optimal program lineup, including a substantial number of programs designed to reach children. Brooks has had every opportunity to veto the purchase or production of any programs that, in its view, would not be suitable. Specific provisions have also been made for the airing of many hours of public service programming over KASW, and that is expected to increase as the station matures.

Under the LMA, Brooks will have access to some of the finest program production facilities in Arizona. With those resources, Brooks' own programs will be created and broadcast with a technical quality that would have been beyond its means as a completely independent, start up operation. Accordingly, Brooks is convinced that LMAs can provide substantial public interest benefits.

In brief, in these comments Brooks will urge the Commission not to regard Local Marketing Agreements and Time Brokerage Agreements (collectively, "LMAs") involving television stations as attributable ownership interests, as is the Commission's current policy with respect to radio LMAs. If the Commission nevertheless decides to treat television LMAs as attributable, then Brooks supports permanent "grandfathering" of agreements that had been entered into before the adoption date of the Notice. Finally, Brooks will also recommend that a broadcast station be entitled to a license renewal "expectancy" based on all programming aired on the station, without regard to whether the programming was supplied under an LMA or from some other source.

II. LMA's Should Not Be Attributed for Ownership Purposes.

Radio LMAs differ significantly from television LMAs. The Commission observed in the Notice that radio LMAs "are often used as precursors to the sale of radio stations pending acquisition of financing and Commission approval of the assignment application."[2] This has led the Commission to treat radio LMAs as ownership interests for purposes of the attribution rules. Specifically, the Commission has held that a licensee's time brokerage of any other radio station in the same market for "more than fifteen percent of the broadcast time per week" must be added to the brokering licensee's station complement for purposes of determining its compliance with the FCC's national and local ownership limits.[3]

Television LMAs, on the other hand, are most frequently found in continuing relationships, as an on-going mode of operating the station, rather than a temporary, interim circumstance. The causes of this difference are not difficult to ascertain. Television broadcasters compete with multichannel program providers like cable systems, multichannel MDS operators and direct broadcast satellite entrepreneurs. The television broadcaster can only offer one channel of program, absent access to the time of another facility through an LMA. Moreover, since television licensees are not allowed to own a second station in the same market, all LMA arrangements entered into in contemplation of a near term sale involve outside purchasers.

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2 Notice at ¶ 137.

3 47 CFR § 73.3555(a)(2)(i).

Thus, Brooks is aware of only one television LMA that operated in anticipation of sale of the station. That agreement related to KOOG-TV, a station which was then under the control of a receiver. The LMA was specifically approved by the Commission's Video Services Division.[4] While litigation before the FCC and local courts extended the time for completion of the sale for many months beyond the normal timeframe, the LMA arrangement provided a mechanism to protect the interests of creditors and keep the station on the air while the problems which delayed the sale were resolved.

Another area of contrast is in the benefit to the parties to television LMAs as well as to the public. While radio LMA's provide some benefits made possible by economies of scale, these benefits are not as significant as in the case of television operations. The economies of scale available from television LMAs, however, are one of the main impetuses for their formation. As the Commission is well aware, a television station requires, in general, many more employees than a radio station. The equipment and facilities required to operate a television station are much more expensive than those for a radio station. Therefore, the likelihood that a solo operator will forego needed program production costs is much greater in the case of television stations. That is particularly true with UHF stations, which are already saddled with higher costs for transmission equipment and

4 Letter dated July 14, 1993, from Barbara A. Kreisman, Chief, Video Services Division, Mass Media Bureau, FCC, to Mr. Harvey M. Budd.

electric power consumption. As indicated above, through Brooks' LMA with Media America Corporation, the station will air more and better public service programs under the LMA than would have been possible without it.

These factors help to explain what is known from experience: that television and radio LMAs are categorically different. For this reason, Brooks urges that television and radio LMAs be treated differently. The television rule should not simply involve a different percentage of broadcast hours that would trigger ownership attribution, but should be qualitatively different. Television LMAs should not be subject to the ownership attribution rules at all.

Moreover, they should not be constricted by the limitation on program duplication applied to radio LMAs. Program duplication is unlikely to occur in any event if the signals of the two stations participating in the LMA overlap. However, sometimes stations need to combine forces in order to reach a wider audience than would be possible with only one station. For example, in markets like Johnstown-Altoona, Pennsylvania, mountain ranges make it difficult for one station to cover the entire market. Where a gap in coverage due to terrain obstruction dictates use of an LMA to expand the geographic reach of a certain program or set of programs, Commission regulation should not stand in the way of a solution based on use of an LMA.[5]

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5 The Notice also asks whether the requirement to file copies of radio LMAs with the FCC should be applied to television LMAs. Since this is simply a matter of filing the LMA documents with the

III. Renewal Expectancy Credit Should Flow from Programs Supplied under an LMA.

The *Notice* requests comment on the effect of LMAs on renewal expectancy of television stations. Brooks recommends that the licensee in an LMA should get full credit toward renewal expectancy for all programming broadcast by its station, whether that program was delivered by the broker, supplied by a syndicator or network, or produced by the licensee.

The licensee would be held responsible for any demerits attributable to LMA-related programs, if the LMA operator indulged in, for example, obscenity or excessive commercialization of children's programming. Likewise, the licensee would be held accountable for any violations of FCC rules by its station, whether such violations were the fault of a broker operating under an LMA or of the licensee itself.

By the same token, the licensee, who is ultimately responsible for all broadcasts of its station, should receive the benefits associated with compliance with those rules and broadcasting in the public interest.

The logic inherent in permitting licensees who are engaged in an LMA to receive a renewal expectancy is further demonstrated in the specific case of KASW. Brook's general manager Gregory R. Brooks will be at the studio full time once the station goes on the air. As noted above, Mr. Brooks has already been (and will continue to be) deeply involved in the programming decisions and

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Commission, Brooks has no objection to this proposal.

plans of the time broker. Accordingly, his direct involvement supports the principle that the licensee, even under an LMA, is always responsible for the programs aired by its station. Fairness requires that such responsibility include reaping the credit for service to the public as well as the blame for a failure to provide such service.

IV. LMAs Entered into Before the Notice Date Should Be Grandfathered.

Finally, the Notice asks for comment on whether "television LMAs entered into before the adoption date of the Notice [should] be subject to the same 'grandfathering' guidelines that govern radio LMAs . . ., irrespective of whether the local television multiple ownership rules are modified."[6]

The radio guidelines do not present the best model for treatment of existing television LMAs. The guidelines for radio LMAs only allow pre-existing LMAs to continue in effect for the remainder of the initial term of the LMA. At the expiration of that term, the parties to the LMA become subject to the governing multiple ownership rules. This includes attribution of ownership to the broker of the brokered station if more than fifteen percent of the station's hours are programmed by the broker.

The present local ownership rules prohibit ownership in more than one television station in a broadcast area. That is, the Grade B contours of two commonly owned stations cannot overlap.

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6 Notice, at ¶ 140.

The Notice proposes changing the local ownership rules to prohibit only concurrent ownership of stations whose Grade A contours overlap. Brooks supports that change.

Most current LMAs among television stations are between two licensees in the same broadcast area. Their Grade A contours as well as Grade B contours overlap. These LMAs were entered into with the expectation that the parties could continue to participate in the LMAs for as long as both parties agreed to do so. The terms of and opportunity for renewal are an integral part of the LMAs for which the parties thereto bargained.

Most parties have made substantial investments in these projects, and reasonably expected that they would continue on beyond just the initial renewal period. It is in the public interest to encourage such investment in better programs, staff and facilities. To limit the operation of such LMAs by what amounts to a sunset provision is contrary to the reasonable expectations of the parties as of the date of contract. Such an action would tend to discourage investments based on FCC rules in place at a given time. Brooks therefore urges the Commission to grant permanent grandfathering to existing LMAs if, contrary to Brooks' position, LMA attribution rules are otherwise applied to television LMAs.

Furthermore, the decision to adopt the same grandfathering guidelines for television LMAs as radio LMAs can only be done fairly if the local television multiple ownership rules are also changed. The grandfathering provision for radio LMAs was adopted at the same time as the local multiple ownership rules for radio stations were relaxed. Existing radio LMAs are allowed to continue for the remainder of the initial term of the LMA, but then are subject to the newly broadened local radio multiple ownership rules. Although the ungrandfathered LMA rules would have caused some early radio LMAs to violate the old local multiple ownership rules, the multiple ownership rules and the LMA rules were changed in one stroke. Consequently, there was little detrimental effect to the reasonable expectations of the parties that had entered into the LMAs in the first place.

This would not be the case with television LMAs if only limited grandfathering of television LMAs is allowed, but without modification of the television multiple ownership rules to allow ownership of a second local channel.

V. Conclusion.

In sum, Brooks encourages the Commission to allow existing TV LMAs to continue without application of the radio LMA rules. In the alternative, the Commission should permanently grandfather such arrangements. In any event, licensees participating in LMAs should qualify for renewal expectancy credit based on the broadcasting provided by their stations, whether originated solely by the licensees or with the help of their time brokers or other program providers.

Respectfully submitted,

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